This Recommended Order and Decision was followed by an Order and Decision in the 3rd Quarter of 2004.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:		
CYNTHIA DAWKINS,		
Complainant,		
and	CHARGE NO:	2000SF0571
	EEOC NO:	21BA0698
ILLINOIS COMMUNITY COLLEGE BOARD,	ALS NO:	S11754
Respondent.		

RECOMMENDED ORDER AND DECISION

On February 24, 2003, a public hearing commenced in this matter. After the presentation of *pro se* Complainant's case-in-chief, Respondent's motion for a directed finding was granted. Complainant did not avail herself of the opportunity to file a motion for reconsideration. As such, this case is ready for decision.

Contentions of the Parties

Respondent contends the case should be dismissed because Complainant, proceeding *pro se*, failed to establish a *prima facie* case of race discrimination at the close of her case-in-chief. Complainant disagrees and further contends she should be provided with a full hearing on the merits and be awarded monetary damages.

Findings of Fact

The following facts are those, after having considered all of the evidence in the record, I found were proved by a preponderance of the evidence. Assertions made in the record which are not addressed in this decision were determined to be unproven or immaterial to this determination.

1. On January 11, 1999, Complainant was hired by Respondent, Illinois Community College Board (ICCB), as an Assistant Director for Occupational Programs.

2. Complaint's race is black.

3. During her tenure with ICCB, Complainant was frequently late to or absent from work because of unavailable childcare for her children.

4. On September 9, 1999 a ICCB secretary accused Complainant of making frequent lengthy personal phone calls during work hours and told Complainant "that's just how you people are."

5. On September 9, 1999, Complainant complained to her supervisor, Carol Lanning, about the secretary's comment which she interpreted to be a racial slur. Lanning instructed Complainant to ignore the secretary's comment and instead counseled Complainant about her frequent tardiness and absences. During the conversation Lanning verbally warned Complainant that if she did not correct her attendance problems then she would be terminated.

6. On April 11, 2000, Complainant filed a charge of discrimination against Respondent with the Illinois Department of Human Rights.

7. On April 4, 2002, the Department filed a single count Complaint of Civil Rights Violation alleging in part that Respondent threatened to discharge Complainant "if she accumulated any more absences due to the care of her children because of her race."

Conclusions of Law

1. The Illinois Human Rights Commission has jurisdiction over the parties and the subject matter in this case.

2. Complainant is an "employee" within the meaning of section 2-101(A)(1) Illinois Human Rights Act.

3. At the time of the alleged incidents, Respondent was an “employer” within the meaning of section 2-101(B)(1)(a) and was subject to the provisions of the Act.

4. Complainant failed to establish a *prima facie* case of race discrimination in that Complainant failed to prove by a preponderance of the evidence that Respondent's

conduct constituted an adverse act or that she was treated differently than similarly situated individuals outside of her protected class.

Determination

Complainant's case should be dismissed with prejudice because she failed to establish a *prima facie* case of race discrimination during her case-in-chief.

Discussion

In this case, Complainant alleged she was discriminated against because of her race when her supervisor issued her a verbal warning of termination. However, during the public hearing, and at the close of Complainant's case-in-chief, Respondent's motion for a directed finding was preliminarily granted. Complainant did not file a motion to reconsider the directed finding, although she was given the opportunity to do so.

In order to survive a directed finding, Complainant must have presented evidence at hearing on every essential element of her claim. ***Castle v. SOI, Illinois Veterans Home at Manteno***, __Ill. HRC. Rep.___ , (1989CF1805, June 29, 1995). If Complainant did not do so, then it was proper to grant Respondent's motion for a directed finding. However, if Complainant did present some evidence on each element of her claim, then I must weigh the evidence to determine if the *prima facie* case has been negated. In that process, if I find that Complainant did not establish a *prima facie* case of race discrimination, then the directed finding in Respondent's favor was proper. ***Id***

At hearing, Complainant could have established her claim either through direct or indirect evidence of discrimination. However, the Complaint filed on her behalf in this case does not allege facts to support a claim of direct evidence of discrimination, so Complainant must have established her case by submitting indirect evidence of discrimination. To do so, typically a complainant is required to establish a *prima facie* case of discrimination. The burden of production then shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. If Respondent does so, then the

burden of proof shifts back to the complainant to establish that the reason is merely a pretext for unlawful discrimination. See, ***Zaderka v. Human Rights Commission***, 131 Ill.2d 172, 545 N.E.2d 684, 137 Ill. Dec. 31(1989). However, because a directed finding was entered at hearing, the issue for purposes of this decision is whether or not our Complainant established a *prima facie* case of race discrimination.

Race Discrimination

In order to establish a cause of action for disparate treatment based on her race, and survive a directed finding in favor of Respondent, Complainant must state, but not prove, a *prima facie* case of race discrimination as applied to unequal terms of employment. Namely, Complainant must show: 1) she is a member of a protected class, 2) she was performing her job consistent with Respondent's legitimate expectations, 3) Complainant suffered an adverse employment action and (4) similarly situated persons who are not members of Complainant's protected class were treated better than she. See, ***Luckenbill, et al v. SOI, Department of Corrections***, ___ Ill. HRC Rep ___, (1989CF2778, 1989CF3535, 1989CF2519, December 10, 1998). In this case, it is undisputed that Complainant is a member of a protected class because she is black. It is arguable whether or not she was performing her job as expected due to her employer's concern with her attendance issues. However, there is no question that Complainant did not suffer an adverse act needed to establish the third element of her *prima facie* case of race discrimination.

Under current Commission precedent an adverse act must be severe and pervasive enough to alter the terms and conditions of Complainant's employment. ***Campion and Blue Cross & Blue Shield Assoc.***, __ Ill. HRC. Rep. ___ (1988CF0062, June 27, 1997). The Commission has previously addressed whether or not a verbal or written warning is an adverse act in the analogous case of ***Jeff and Kim Daugherty and DeWitt Co. Sheriff's Department***, __ Ill. HRC. Rep. ___ (1995SN0863, 1995SN0864,

October 13, 1999). In that case a complainant was issued a written warning concerning her work conduct which stated that "further conduct of such nature may result in discipline." *Slip op* at 19. After a public hearing on the merits, the administrative law judge found that the written warning did not constitute an adverse act because, while the warning put the employee on notice of possible future discipline, it was not discipline *per se.* In the instant case, as in ***Daugherty***, Complainant was put on notice of future termination if her conduct did not improve, but she did not receive any interim discipline that would constitute an adverse act. If the verbal warning of termination was determined to be an adverse act, it "could lead to an employer ending up before the Human Rights Commission every time they suggest …a way to improve job performance or point out that the employee did something wrong. Such a holding would simply make no sense." ***Daugherty***, *slip op* at 22. Consequently, under ***Daugherty,*** Complainant's verbal warning of termination could never amount to an adverse act as a matter of law and her *prima facie* case fails at this juncture.

Moreover, even if Complainant could have established that she suffered an adverse act, she did not present any evidence to support the fourth element of her *prima facie* case, *i.e.*, evidence of a white employee with similar attendance problems who had been threatened with termination. Therefore, for the reasons discussed above, in viewing the facts in the light most favorable to Complainant, I cannot say that she established elements three and four of her *prima facie* case in order to prevail or even to proceed to a full hearing on the merits. As such, a directed finding on the claim of race discrimination was proper.

Recommendation

Based on the above findings of fact and conclusions of law, I recommend that the Illinois Human Rights Commission uphold the directed finding in favor of Respondent;

and dismiss with prejudice the complaint of Cynthia Dawkins against the Illinois Community College Board, together with the underlying charge number 2000SF0571.

ILLINOIS HUMAN RIGHTS COMMISSION

KELLI L. GIDCUMB
Administrative Law Judge
Illinois Human Rights Commission

ENTERED THE 31ST DAY OF JULY, 2003.